No. 12279

In the United States Court of Appeals

For the Ninth Circuit

ESTATE OF DELL HINDS HIGGINS, Deceased,
SYDNEY M. HIGGINS, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

BRIEF FOR THE PETITIONER

GEORGE H. STONE,
1004 San Diego Trust & Savings Bldg.,
San Diego 1, California,
Counsel for Petitioner.

WM. D. MORRISON,
840 San Diego Trust & Savings Bldg.,
San Diego 1, California,
Counsel for Petitioner.

FILED
SEP 1 1949
PAUL P. O'BRIEN,

TOPICAL INDEX

Page

Opinion of The Tax Court 1

Jurisdiction 2

Questions Presented 3

Revenue Act, Internal Revenue Code and Regulations Involved:

The Law Applicable to the Trust Indenture at the Time it was Executed, March 24, 1928 4

Code and Regulations Not Applicable as They Became Effective Subsequent to the Date of the Trust, March 24, 1928 5

Statement 9

Synopsis of Exhibits:

Joint Exhibit 1-A: Form 706, Treasury Department Estate Tax Return 10

Joint Exhibit 2B: Trust Indenture dated March 24, 1928 10

Joint Exhibit 3-C: Complaint for Declaration of Rights Under Trust Indenture and for Equitable Relief 11

Joint Exhibit 4-D: Answer (to plaintiff's complaint) 11

Joint Exhibit 5-E: Decree Superior Court made March 13, 1941 11

Joint Exhibit 6-F1: Notice of Motion to Vacate and Set Aside Judgment and Enter Judgment in Lieu Thereof 12

Page

Joint Exhibit 6-F2: Affidavit, dated April 19, 1941, in support of motion 12

Joint Exhibit 7-G: Decree of the Superior Court made April 21, 1941 12

Joint Exhibit 8-H: Petition for Order Allowing Payment from Corpus of Trust 12

Joint Exhibit 9-I: Order Allowing Payment from Corpus of Trust 12

Joint Exhibit 10-J: Petition for Order Allowing Additional Payment from Corpus of Trust 13

Joint Exhibit 11-K: Amendment to Petition for Order Allowing Additional Payment from Corpus of Trust 13

Joint Exhibit 12-L: Order Allowing Additional Payment from Corpus of the Trust 13

Joint Exhibit 13-M: Affidavit 14

Joint Exhibit 14-N: Inventory of Trust No. 5611 as of the date of Death, March 3, 1945, Dell M. Higgins, Trustor 14

Petitioner's Exhibit 15: Pass Book, Savings Account No. 80159 with Southern Trust and Commerce Bank 14

Petitioner's Exhibit 16: Complaint for Divorce, Samuel Harrow, Plaintiff, vs. Dell M. Harrow, Defendant 15

Petitioner's Exhibit 17: Commission to take Deposition of Mary Mountain, Certificate, and Deposition of Mary Mountain 16

Page

Petitioner's Exhibit 18: Interlocutory Judgment by Default in Action for Divorce 17
Petitioner's Exhibit 19: Final Judgment of Divorce 17
Petitioner's Exhibit 20: Petition to change the name of petitioner from Dell M. Harrow to Dell Hinds Higgins 17
Petitioner's Exhibit 21: Order Changing Name 17
Respondent's Exhibit O: Affidavit of Sydney M. Higgins 18
Respondent's Exhibit P: Affidavit of Helen B. Kendall 18
Statement of Evidence 18
Summary of Evidence 34
Specification of Errors Relied Upon 35
Summary of Argument 37
Argument 38
Conclusion 59

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Church, Estate of; Commissioner v., 335 U. S. 651, 69 S. Ct. 337 .... 37, 39, 40, 41, 58

Colorado National Bank v. Commissioner, 305 U. S. 23, 59 S. Ct. 48, 21 A. F. T. R. 57

Coolidge v. Long, 282 U. S. 582, 51 S. Ct. 306, 75 L. Ed. 562 .... 52, 53

Coolidge, Nichols v., 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184 52

Durant, Estate of, v. Commissioner, 41 B. T. A. 462 .... 37, 39, 46, 58

May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826 .... 48, 50, 52

McCormick v. Burnet, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413 .... 50, 53

Morsman v. Burnet, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412 .... 50, 53

Northern Trust Co., Burnet v., 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412 .... 50, 53

St. Louis Trust Co., Becker v., 296 U. S. 48, 56 S. Ct. 78 57

Spiegel, Estate of, v. Commissioner, 335 U. S. 701, 69 S. Ct. 301 .... 37, 39, 46, 58

Welch, Hassett v., 303 U. S. 303, 58 S. Ct. 559 49

Wells, United States v., 283 U. S. 102, 51 S. Ct. 446 57

West, Estate of, v. Commissioner, 9 T. C. 736 37

Statutes

Page

Internal Revenue Code:

Sec. 272 2

Sec. 1141 2

Sec. 1142 2

Sec. 811(c) 5, 35, 36, 38, 49, 54, 57

Sec. 811(d)(2) 5, 35, 36, 38, 49, 57

Revenue Act of 1926:

Sec. 302(c) 4, 49, 50, 53, 58

Joint Resolution of Congress of March 3, 1931..........3, 4

Miscellaneous

Treasury Regulations 105:

Sec. 81.16 6

Sec. 81.17 8

H. R. 5045.......... 54

H. R. 5268.......... 54

Fifth and Fourteenth Amendments to the Constitution of the United States of America..........36, 38, 53, 57

In the United States Court of Appeals

For the Ninth Circuit

ESTATE OF DELL HINDS HIGGINS, Deceased, SYDNEY M. HIGGINS, Executor, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 12279

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

BRIEF FOR THE PETITIONER

OPINION OF THE TAX COURT

The Memorandum Findings of Fact and Opinion of The Tax Court of the United States (R. 113-127) are not officially reported.

JURISDICTION

The petition for review (R. 128-138) involves Federal Estate Tax, date of death March 3, 1945. On March 20, 1946, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency in the total amount of $29,009.69 (R. 4, 9-12). Within 90 days thereafter and on May 13, 1946, the taxpayer filed his petition and subsequently his amended petition, June 3, 1946, with The Tax Court of the United States for a redetermination of the deficiency, pursuant to provisions of section 272 of the Internal Revenue Code (R. 3-21). The decision of The Tax Court sustaining the deficiency was entered February 17, 1949, (R. 127). The case is brought to this Court by petition for review filed May 11, 1949, (R. 128-138), pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Did The Tax Court erroneously determine, as to the portion of the trust from which the decedent reserved the right to the income for life, it was includible in the gross estate notwithstanding the trust was created prior to March 3, 1931, which was the date of the Joint Resolution of Congress relating to trusts?

2. Did The Tax Court improperly determine the balance of the trust should be included as part of decedent's estate although under the provisions of the trust indenture neither the trustor nor the trustee could invade the corpus of the trust?

3. Did The Tax Court err in determining that the decedent had invaded the corpus of the trust property and by so doing postpone the transfer of the trust corpus until her death, whereas she actually parted with the property in question and all control over it on March 24, 1928, the date of the creation of the trust, with no possible chance of it reverting to her?

4. Did The Tax Court erroneously determine that it was not necessary to consider the alternative contention of a transfer in contemplation of death, that the decedent was not in bad health at the time the trust was made and lived for a period of 17 years thereafter?

REVENUE ACT, INTERNAL REVENUE CODE, AND REGULATIONS INVOLVED

The Law Applicable to the Trust Indenture at the Time It Was Executed, March 24, 1928

At the time the trust was executed and became effective on March 24, 1928, the law applicable to the said trust was under section 302(c) of the Revenue Act of 1926. During the period from January 1, 1926, to June 2, 1932, there was no Federal gift tax act in effect. The Joint Resolution of the Congress of March 3, 1931, the amendment to section 302(c) of the Revenue Act of 1932, and subsequent amendments thereto are prospective in their operation and for that reason do not impose a tax in respect to past irrevocable transfers with reservation of a life interest. Section 302(c) of the Revenue Act of 1926, petitioner contends, is the only act applicable to the said trust and imposes no tax thereon, which act reads as follows, to wit:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or in an interest therein, not admitted or shown to have been made in con-

template of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

Code and Regulations Not Applicable as They Became Effective, Subsequent to the Date of the Trust, March 24, 1928.

The Tax Court relied upon sections 811(c) and 811(d) (2) of the Internal Revenue Code, although neither of the said code provisions nor the regulations with reference to said section and subsection became effective until subsequent to the effective date of the trust here in question, namely, March 24, 1928. The said sections were not retroactive and for that reason the findings of The Tax Court were contrary to the Fifth and the Fourteenth Amendments to the Constitution of the United States of America.

Internal Revenue Code:

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

. . .

(c) **Transfers in Contemplation of, or Taking Effect at Death.**—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . .

(d) **Revocable Transfers.**—

. . .

(2) **Transfers on or Prior to June 22, 1936.**—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. . . . "

Regulations 105:

"SEC. 81.16 **Transfers in contemplation of death.**—Transfers in contemplation of death made by the

decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

"The phrase 'contemplation of death,' as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

"Any transfer without an adequate and full consideration in money or money's worth, made by the decedent wthin two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death.

"If the executor contends that the value of a transfer of $5,000 or more made by the decedent

subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate."

"SEC. 81.17 **Transfers intended to take effect at or after the decedent's death.**—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is 'intended to take effect in possession or enjoyment at or after his death', and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be

obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916."

. . .

STATEMENT

The facts as found by The Tax Court are set out in Transcript of Record, pages 113-126.

Opening statements were made on behalf of each of the parties by their respective counsel. By STIPULATION OF FACTS, which was received in evidence and refers to Joint Exhibits Nos. 1-A to 14-N inclusive, it was agreed by the parties that the facts as set out in the said stipulation would be accepted as true, reserving to either party the right to introduce any proper evidence not inconsistent therewith (R. 23-28, 113). Petitioner's Exhibits Nos. 15 to 21 inclusive were marked for identification and Exhibits Nos. 15, 18, 19, 20, and 21, were received in evidence. Exhibit No. 16 was received in evidence and subsequently

rejected, exception noted, (R. 90, 91-94, 97, 99, 107, 110-112). Exhibit No. 17 was identified but not received in evidence, exception noted, (R. 95-97, 99, 107, 110, 111). Respondent's Exhibits lettered O (R. 54, 77, 78) and P (R. 102) were introduced and received in evidence.

SYNOPSIS OF EXHIBITS

JOINT EXHIBITS 1-A: FORM 706, TREASURY DEPARTMENT ESTATE TAX RETURN. This Return was filed with the Collector of Internal Revenue of the Sixth District of California on or about May 15, 1945, and reported a total gross estate of $5,406.27. After taking into consideration the allowable deductions and specific exemptions for the basic tax and for the additional tax, there was no net estate and therefore no Federal estate tax resulted. (Stip. Par. 1.) (R. 23, 112, 113.)

JOINT EXHIBIT 2-B: TRUST INDENTURE dated March 24, 1928. The pertinent parts of this instrument, as far as this case is concerned, are: Paragraph 1 conveying decedent's property; Paragraph 5—distribution of net income of the trust; Paragraph 6—termination of the trust; Paragraph 7—insufficiency of income and provision for payment from corpus for the comfort, well-being or education of any of the beneficiaries of the trust, if such beneficiary had no other means sufficient for the purpose, then upon representation and

proof of such fact to a court of competent jurisdiction and upon order of such court resort may be had to the corpus of the trust estate to the extent necessary to relieve the situation and the amount charged to the respective beneficiary; and Paragraph 9—trust irrevocable, new trustee, restriction of trustee to an incorporated trust company authorized to do business in the State of California. (Stip. Par. 4.) (R. 13-21, 24.)

JOINT EXHIBIT 3-C: COMPLAINT FOR DECLARATION OF RIGHTS UNDER TRUST INDENTURE AND FOR EQUITABLE RELIEF, filed on February 6, 1941, by trustor and her two children, in the Superior Court of the State of California in and for the County of San Diego, against the San Diego Trust and Savings Bank, then trustee under the said trust, for the purpose of authorizing the trustee under its power or discretion to make investments of a type or kind more liberal than authorized in the original trust indenture. (Stip. Par. 6.) (R. 24.)

JOINT EXHIBIT 4-D: ANSWER (to plaintiff's complaint) filed by the San Diego Trust and Savings Bank, February 25, 1941. (Stip. Par. 7.) (R. 25.)

JOINT EXHIBIT 5-E: DECREE Superior Court made March 13, 1941, which authorized the trustee under its power or discretion to make investments of a type or kind more liberal than set out in the original trust indenture. (Stip. Par. 8.) (Set aside by Decree made April 21, 1941, Joint Exhibit 7-G.) (R. 25.)

JOINT EXHIBIT 6-F1: NOTICE OF MOTION TO VACATE AND SET ASIDE JUDGMENT AND ENTER JUDGMENT IN LIEU THEREOF, dated April 19, 1941, on grounds of mistake and inadvertence. (Stip. Par. 9.) (R. 25.)

JOINT EXHIBIT 6-F2: AFFIDAVIT, dated April 19, 1941, in support of motion. (Stip. Par. 9.)

JOINT EXHIBIT 7-G: DECREE of the Superior Court made April 21, 1941, which set aside Decree in said matter made March 13, 1941, Joint Exhibit 5-E. Joint Exhibit 7-G amended paragraph 3, subdivision (a) of said trust indenture which further enlarged the power or discretion of the trustee to invest and reinvest the funds of the said trust. (Stip. Par. 10.) (R. 25.)

JOINT EXHIBIT 8-H: PETITION FOR ORDER ALLOWING PAYMENT FROM CORPUS OF TRUST, filed May 27, 1943, in the Superior Court of the State of California in and for the County of San Diego, to allow payment to the trustor under said trust indenture up to $300 a month, to be paid out of income if sufficient, any balance out of corpus. (Stip. Par. 11.) (R. 25.)

JOINT EXHIBIT 9-I: ORDER ALLOWING PAYMENT FROM CORPUS OF TRUST, made June 11, 1943, by the Superior Court, wherein the trustee is authorized and directed to make monthly payments to the beneficiary, DELL M. HIGGINS, in the sum of Three

Hundred Dollars ($300.00) per month, paying out of income if sufficient, if not any balance out of the corpus of the truste estate as may be necessary to make such monthly payments until further order of the Court. (Stip. Par. 12.) (R. 25.)

JOINT EXHIBIT 10-J: PETITION FOR ORDER ALLOWING ADDITIONAL PAYMENT FROM CORPUS OF TRUST, filed October 25, 1943, in the Superior Court, to direct the trustee to increase payments to the trustor from $300 a month to $445 a month from income if sufficient but if insufficient balance to be paid out of corpus. (Stip. Par. 13.) (R. 26.)

JOINT EXHIBIT 11-K: AMENDMENT TO PETITION FOR ORDER ALLOWING ADDITIONAL PAYMENT FROM CORPUS OF TRUST, filed November 19, 1943, in the Superior Court, which added to the prayer of the petition, Exhibit 10-J, as follows: "or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance." (Stip. Par. 14.) (R. 26.)

JOINT EXHIBIT 12-L: ORDER ALLOWING ADDITIONAL PAYMENT FROM CORPUS OF THE TRUST, made November 19, 1943, by the Superior Court, in which it ordered the trustee to make monthly payments to the beneficiary, Dell M. Higgins, or her order, or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance, in the sum of $445, payment thereon the net income from said trust and in addition thereto such

part of the corpus of the trust estate as may be necessary to make such monthly payments continuing until further order of the Court. (Stip. Par. 15.) (R. 26.)

JOINT EXHIBIT 13-M: AFFIDAVIT setting forth that the following items were paid out of the principal of the trust:

4/10/45	Bradley-Woolman Mortuary funeral expenses	$ 574.94
8/22/45	W. S. Heller, County Treasurer, California State Inheritance Tax in matter of Estate of Dell Hinds Higgins, deceased, per order of fixing Inheritance Tax dated 8-1-45	$3,262.44

(Stip. Par. 16.) (R. 27.)

JOINT EXHIBIT 14-N: INVENTORY OF TRUST No. 5611 AS OF THE DATE OF DEATH, MARCH 3, 1945, DELL M. HIGGINS, TRUSTOR, shows there was $188,302.40 in said trust at the time of trustor's death, March 3, 1945. (Stip. Par. 17.) (R. 27.)

PETITIONER'S EXHIBIT 15: PASS BOOK, Savings Account No. 80159 with Southern Trust and Commerce Bank which shows $5,000 was drawn on April 2, 1928, to get Samuel Harrow, husband of Dell M. Harrow, out of the family in a hurry (R. 88, 89, 90, 105, 106, 117); $15,000 transferred to the trustee under the trust indenture dated March 24, 1928, (R. 90, 106, 117); and withdrawal of the balance of the account on

April 3, 1928, by Dell M. Harrow (subsequently Dell M. Higgins), in the sum of $418.51. (R. 90, 106, 117.)

PETITIONER'S EXHIBIT 16 was received in evidence and subsequently rejected, exception noted, (R. 90, 91-94, 97, 99, 107, 110-112): COMPLAINT FOR DIVORCE, SAMUEL HARROW, Plaintiff, vs. DELL M. HARROW, Defendant, filed June 6, 1928, in the Superior Court of the State of California in and for the County of San Diego, wherein plaintiff alleges "Defendant treated Plaintiff with extreme cruelty, the course of which treatment gradually grew worse and worse until the ends and objects of matrimony as between said parties were utterly destroyed, and caused Plaintiff great worry and mental anguish.

"That some particulars of said wrongful conduct are as follows:

"That Defendant was possessed of considerable means in her own right at the time of said marriage, while Plaintiff was a man of ordinary means and dependent upon his own earnings for a livelihood; that though Defendant knew said facts at and before the time of said marriage, yet subsequent to the date hereof said difference in financial standing became a constant source of friction between said parties, and a constant source of nagging of Plaintiff by Defendant to his great embarrassment and humiliation; that said attitude of Defendant was aggravated by a like attitude on the part of her children by a former marriage,

whose actions in said regard were upheld by Defendant; that said attitude on the part of Defendant became so exaggerated as to amount to an obsession with her which led her to extreme antagonism with the results aforesaid.

"That said obsession on the part of Defendant led her into such extremes that she took steps to secrete her money and funds from Plaintiff. That on one recent occasion by reason of said obsession and unfounded suspicion that Plaintiff was thus attempting to gain control of Defendant's funds she, the said Defendant, caused the Plaintiff to be locked out of her room, and on another recent occasion caused her room to be changed at a hospital where she had been staying, and where Plaintiff was in the habit of calling on her."

PETITIONER'S EXHIBIT 17: COMMISSION TO TAKE DEPOSITION OF MARY MOUNTAIN, CERTIFICATE, AND DEPOSITION OF MARY MOUNTAIN, offered in evidence, objected to by respondent, objection sustained, exception noted. (R. 95-97, 99, 107, 110, 111.) The object and purpose in requesting the said instrument to be submitted in evidence was to show the reason for the creation of the trust March 24, 1928, Joint Exhibit 2-B, as a part of the said deposition reads as follows, to wit:

> "6. Q. What, if anything, did you observe regarding Defendant's attitude toward Plaintiff on money matters?

A. She had the idea in her head constantly that Mr. Harrow was trying to get her money and talked about it all the time, and was always afraid Mr. Harrow would try to get her to sign a check for a large amount of money, and was afraid he would do her physical harm."

"9. Q. Did Defendant ever discuss with you, or did you ever learn of any attempt on the part of Defendant to place her money or funds out of reach or control of Plaintiff—if so, state briefly the circumstances?

A. Yes, Mrs. Harrow had me go into the Bank of Italy at San Diego and arrange with the Bank to have all her business and money handled through their Trust Department."

PETITIONER'S EXHIBIT 18: INTERLOCUTORY JUDGMENT BY DEFAULT IN ACTION FOR DIVORCE, July 5, 1928, by the Superior Court. (R. 96, 97.)

PETITIONER'S EXHIBIT 19: FINAL JUDGMENT OF DIVORCE, made July 6, 1929, by the Superior Court. (R. 97.)

PETITIONER'S EXHIBIT 20: PETITION filed in the Superior Court July 29, 1929, to change the name of petitioner from Dell M. Harrow to Dell Hinds Higgins. (R. 98.)

PETITIONER'S EXHIBIT 21: ORDER CHANGING NAME, made August 30, 1929, by the Superior Court, changing petitioner's name from Dell M. Harrow to Dell Hinds Higgins. (R. 98.)

RESPONDENT'S EXHIBIT O: AFFIDAVIT OF SYDNEY M. HIGGINS, dated April 23, 1946. This exhibit is of no importance other than there was a general misinterpretation placed upon it both by Counsel for the Respondent and the Court, which materially upset the witness because of his difficulty in hearing. (R. 54, 78.)

RESPONDENT'S EXHIBIT P: AFFIDAVIT OF HELEN B. KENDALL, dated April 30, 1946. (R. 102.) An erroneous interpretation was placed upon the intent of the language of the affidavit by Counsel for the Respondent and the Court.

STATEMENT OF EVIDENCE

(From Stipulation of Facts (R. 23-28), Memorandum Findings of Fact (R. 113-126), Exhibits, and Oral Testimony of Sydney M. Higgins and Helen B. Kendall, Son and Daughter of Trustor (R. 30-112).)

Dell Hinds Higgins, the decedent, was born on May 31, 1869, and died March 3, 1945. At the time of her death she was a resident of the County of San Diego, California. Petitioner filed a Federal estate tax return, Joint Exhibit 1-A, with the collector for the sixth internal revenue collection district of California on May 15, 1945. (R. 23, 113.) The return so filed did not disclose a net estate. (R. 113.)

Decedent and her two sisters had been the beneficiaries of the estate of their parents which included a

building in Seattle, Washington. The estate formed a corporation called Hinds Estate, Incorporated, to operate the building, and decedent became vice-president of that corporation at a salary of $70 per month. (R. 72, 73, 114.)

In 1887 decedent married Albert Edward Higgins. They had two children, a son, Sydney M. Higgins, born March 2, 1889, and a daughter, Helen B. Higgins, born July 17, 1894. Helen was married on April 10, 1917, to Kenneth Kendall. Decedent's first husband died in 1913. Both of their children are still living. (Stip. Par. 2.) (R. 23, 24.) Sydney has three children (R. 76, 114), and Helen has one child (R. 100, 114).

Albert Higgins left no will at the time of his death. (R. 49, 114.) Both Sydney and Helen were of age at that time and never claimed any share of the estate which went in its entirety to decedent. (R. 49, 114.) A part of the estate of Albert Higgins rightfully belonged to Sydney and Helen and that was the reason they each received $75 a month from the trust dated March 24, 1928. (R. 41, 49.)

In about 1903 decedent almost died of pneumonia. (R. 46, 114.) In 1918 she fell and injured her hip, and for the remainder of her life she was not able to walk well. (R. 47, 114.)

In 1919 Sydney Higgins met Samuel Harrow, who was employed by a jewelry firm, Jessop's, in San Diego; he didn't know how long his Mother had known

Harrow, or the kind of work he did (R. 43, 44); Harrow was not married, and was eight or nine years older than decedent. After knowing Harrow for six years or more, decedent married him on April 9, 1925. (Stip. Par. 3.) (R. 24, 45, 114.) Decedent wanted companionship and did not want Harrow to work. (R. 45, 114.) After they were married he resigned his position with the jewelry firm and became financially dependent upon decedent. (R. 37, 44, 114.) Thereafter, controversies arose relating to money matters. Harrow plagued and harrassed decedent for money and caused her to become highly nervous. (R. 32, 47, 88.) She became afraid of Harrow, who would take her past cemeteries and hospitals and tell her that that was where he was going to put her. He constantly made demands upon her for money and kept her in an agitated mental condition. She had a constant fear that Harrow was going to cause her death in order to get her money. (R. 33, 49, 50, 55.) (R. 115.)

A few months before March 24, 1928, when decedent created the trust here in question (R. 48), she went to Paradise Valley Sanitarium at National City, near San Diego, California. (R. 33, 34, 47.) She desired to get away from Harrow. (R. 34, 50, 56.) (R. 115.)

On the evening of March 19, 1928, a doctor at Paradise Sanitarium called Sydney and requested him to come to the sanitarium immediately because Harrow had been coming there frequently and disturbing decedent by making demands upon her for advances of

money, and that on that morning decedent had walked downstairs from her room and was sitting out in the front garden when Harrow came; that while he was conversing with her he suddenly stepped off a few feet and threw a bunch of keys at decedent, hitting her in the face. The keys cut her. (R. 32, 33.) The reason for Harrow throwing the keys was that he had brought certain papers to the sanitarium for decedent to sign giving him all of her property and it was her refusal to sign the papers that caused him to get angry and throw the keys which hit decedent. (R. 34, 58.) Sydney went to his mother at once. (R. 33.) She was in a nervous and upset condition; she cried frequently and her digestive system was upset. (R. 34, 86, 87, 102, 107, 108, 110, 115.) Although there is testimony in the record that the decedent was seriously ill at the time the trust was created, March 24, 1928, (R. 56, 79-84) it is definitely shown by the record that she was not ill in the sense that there was any anticipation of her death. (R. 38, 46, 47, 88, 101.) She was not confined to her bed, she did not have a special nurse or doctor at the sanitarium (R. 47), she was up and about and walked out to the garden. (R. 33, 51.) She went to the sanitarium to get away from her then husband, Samuel Harrow, and to rest. (R. 34, 47.) She was, as a person always is in a sanitarium, under the care of the resident physician while she was at the sanitarium. (R. 109, 110.) (R. 115.)

She left the sanitarium within a month or two, having improved rapidly after she created the trust, as hereinafter related. (R. 82, 109, 116.)

After Sydney and decedent talked the matter over, Sydney went into San Diego and met an attorney whom he knew. He consulted with the attorney on the problem and the attorney suggested the creation of a trust to put decedent's property beyond her control or anybody else's control, to meet the situation. (R. 34.) Numerous conversations were had between decedent and her attorney. (R. 116.) Sydney was present at the conferences. (R. 35.) Decedent expressed her intention to divest herself of all her property and in such manner that it would not be subject to Federal estate tax. (Respondent's Exhibits O, P.) (R. 116.) In preparation of the trust agreement, decedent, Sydney, Helen, and the attorney discussed the making of the trust absolutely irrevocable, in order that there should be no Federal estate tax charge against it, and the attorney prepared the trust under the law then in force and advised decedent that it would not be subject to estate tax. (Respondent's Exhibits O, P.) (R. 116.)

Sydney and Helen were interested in the property that went into the trust and felt that part of it belonged to them since it had been left by their father. Decedent willingly recognized this fact in making provision in the trust for the children, so that each of them received $75 a month from the income of the said trust. (R. 41, 49, 116.)

The entire matter was handled expeditiously, and on March 24, 1928, decedent executed the trust instrument. (R. 83, 116.) During this time decedent was in a nervous and upset condition, but she made no remarks of expecting death or being near death. (R. 38, 88, 108, 110.)

Decedent was a good business woman and did not want to sign the trust since she realized that by doing so she would lose complete control of her property. However, she felt it was the only way to get free from the demands of Harrow and to prevent him from obtaining any part of her property. Decedent transferred everything she owned to the trust, except her car, jewelry, and her salary of $70 per month as vice-president of the Hinds Estate, Incorporated, and $5,-418.51 of her savings account with the Southern Trust and Commerce Bank of San Diego, $15,000 being drawn from this account and placed in the trust. Of the balance, $5,000 was withdrawn and paid to Harrow as a property settlement in connection with the divorce action which he was bringing. Petitioner's Exhibit 15.) (Stip. Par. 4. R. 24.) (R. 37, 75, 88, 105, 106, 116, 117.)

The Bank of Italy National Trust and Savings Association was named trustee of the trust. (R. 13, 117.) Its duties and powers as trustee included the following:

> a. The Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate and shall invest and reinvest

all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments shall be on such security or in such securities as may be lawful for the investment of the funds of savings banks in the State of California; the Trustee shall act with diligence to so hold and manage the Trust Estate and the property and funds of the Trust Estate that the net income of the Trust Estate shall be as large as possible within the limit of the restrictions hereinbefore set forth. (Joint Exhibit 2-B, Par. 3-a.) (R. 14, 117.)

. . .

e. In the event that legal service or legal advice may be necessary in order to preserve or protect the Trust Estate the sole right to select and appoint the attorney or attorneys to represent the Trust Estate shall be in any two of the following persons, to wit: (1) The Trustor; (2) Helen B. Kendall; and (3) Sydney M. Higgins; after the death of the Trustor such right to appoint and select such attorney or attorneys shall be in the said Helen B. Kendall and Sydney M. Higgins, or the survivor of them. (Joint Exhibit 2-B, Par. 3-e.) (R. 15, 16, 118.)

f. The Trustee shall pay out of the corpus of the Trust Estate the funeral expenses of the Trustor, upon the death of Trustor, the Trustee shall also pay out of the corpus of the Trust Estate all inheritance and estate taxes owing by the estate of the Trustor or by the beneficiaries herein designated upon the death of Trustor. (Joint Exhibit 2-B, Par. 3-f.) (R. 16, 118.)

With respect to the current net income, the Trust indenture provided as follows:

> 5. During the continuance of this trust the net income of the Trust Estate remaining after payment of the costs and expenses of the administration and management of this Trust shall be paid by the Trustee as follows:
>
> A. During the lifetime of the trustor:
>
> a. Seventy-five Dollars ($75) per month to Helen B. Kendall, or if she be dead to her issue by right of representation.
>
> b. Seventy-five Dollars ($75) per month to Sydney M. Higgins, or if he be dead to his issue by right of representation.
>
> c. The entire balance of the net income of the Trust Estate to the Trustor.
>
> B. After the death of the Trustor:
>
> In equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of said beneficiaries then the share of such beneficiary shall be paid to the issue of such deceased beneficiary by right of representation.

(Joint Exhibit 2-B, Par. 5.) (R. 16, 17, 118, 119.) Sydney and Helen have each been receiving monthly payments as above provided. (R. 41, 119.)

By its terms the trust is to terminate upon the death of decedent and both of her children, at which time the corpus is to be distributed one-half to the issue of Sydney and one-half to the issue of Helen by right

of representation. Failing issue of either, the entire corpus is to go to the issue of the other. Failing issue of both, the corpus is to go to the heirs at law of Sydney and Helen. (Joint Exhibit 2-B, Par. 6.) (R. 17, 119.)

The trust is declared to be irrevocable. (Stip. Par. 5.) (R. 24, 119.) However, the trustor during her lifetime reserved the right from time to time to appoint a new and different trustee being restricted only to an incorporated trust company authorized to do a trust business in the State of California. In accordance with that reserved power decedent twice changed the trustee. (Joint Exhibit 2-B, Par. 9.) (Stip. Par. 4.) (R. 19, 24, 119.)

Paragraph 7 of the trust indenture provides as follows:

> If it should happen during the continuance of this trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts. (Joint Exhibit 2-B, Par. 7.) (R. 18, 119, 120.)

Decedent's marriage to Harrow was terminated by a final decree of divorce issued July 6, 1929. On August 30, 1929, decedent had her name changed back to Higgins. (Stip. Par. 3.) (R. 24, 120.)

Early in 1941 decedent desired to alter or amend the trust indenture so as to relieve the trustee of the restrictions contained in subparagraph a of paragraph 3, *supra,* with respect to investing the trust funds "in such securities as may be lawful for the investment of the funds of savings banks in the State of California." Therefore, decedent had her two children, Sydney and Helen, join her in filing with the Superior Court of the State of California, on February 6, 1941, a document captioned "Complaint for Declaration of Rights under Trust Indenture and for Equitable Relief." The trustee was named defendant. In the complaint it was alleged that decedent "did not and could not anticipate the economic changes that have taken place since March 24, 1928, upon which said date said Trust was established" and as a consequence the income from the restricted investments would probably be so small that an application to the Court for invasion of corpus under paragraph 7, *supra,* would be required. (Joint Exhibit 3-C.) (Stip. Par. 6. R. 24.) (R. 120, 121.)

The trustee-defendant filed an answer on February 25, 1941, in which substantially all of the allegations of fact contained in the complaint were admitted and in which the trustee joined decedent in praying for such decision and judgment as the Court considered

proper in the premises. (Joint Exhibit 4-D, R. 25.) On March 13, 1941, the Court entered its decree changing subparagraph a of paragraph 3 of the trust indenture to read as follows:

> a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate, and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments hereafter from time to time made by the Trustee shall be in bonds, whether the same be lawful for the investment of funds of savings banks in California or not, and in such preferred and/or common stocks as the Trustee may from time to time select; the Trustee shall act with diligence and shall so hold and manage the trust estate and the property and funds composing the same that the net income of the Trust Estate shall be as large as possible within the limits of the restrictions hereinabove set forth. (Joint Exhibit 5-E.) (Stip. Par. 8, R. 25.) (R. 121.)

The form of the court decree entered March 13, 1941, "did not truly express the agreement of the parties" so, on April 19, 1941, decedent again went to court, this time filing a "Notice of Motion to Vacate and Set Aside Judgment and Enter Judgment in Lieu Thereof." (Joint Exhibits 6-F, 1 and 2.) (Stip. Par. 9, R. 25.) On April 21, 1941, the Court entered another decree again changing subparagraph a of paragraph 3 of the trust indenture to read as follows:

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said estate, and shall invest and reinvest all funds of the trust estate in such manner as to produce a *reasonably* high net income, for which purpose the Trustee may make any investments which are of medium or higher grade; all investments hereafter from time to time made by the Trustee shall be in:—bonds, mortgages, and/or trust deed notes, secured by improved real estate (whether the same be lawful for the investment of funds of savings banks in California or not), and/or in such preferred and/or common stocks as the Trustee may select, and within the investment limitations above set forth. (Joint Exhibit 7-G.) (Stip. Par. 10, R. 25.) (R. 122.)

On May 27, 1943, decedent petitioned the Court for an order authorizing and directing the trustee to pay to her the sum of $300 per month out of income, if available, otherwise out of corpus. The petition stated in part that the estimated available income of $225 per month for the succeeding twelve months "is insufficient to adequately provide for her comfort and well-being, and that she has no other means of support or other income." No one appeared to oppose the granting of the relief prayed for (Joint Exhibit 8-H) (Stip. Par. 11, R. 25) and on June 11, 1943, the Court entered its order authorizing and directing the trustee to make the payment of $300 per month "paying thereon the net income from said trust and in addition thereto such part of the corpus of the trust estate as may be neces-

sary to make such monthly payments until the further order of this Court." (Joint Exhibit 9-I.) (Stip. Par. 12, R. 25, 26.) (R. 122, 123.)

On October 25, 1943, decedent filed with the Court a Petition for Order Allowing additional payment from Corpus of Trust. The petition stated in part that in previously petitioning the Court for $300 per month, a payment of $75 per month to her chauffeur had been overlooked so that the net income available to her amounted to only $225 per month; furthermore, in the past sixty days, due to the pending liquidation of Hinds Estate, Incorporated, her salary of $70 per month as vice-president had been discontinued. In praying for an order authorizing and directing the trustee to pay her $445 per month ($300 plus $75 plus $70 out of income, if available, otherwise out of corpus), decedent stated in her petition as follows:

> That the whole of said trust estate was set up out of petitioner's own funds and for her benefit and support; that she is over seventy years of age, and has need of the comforts it can give her as never before. (Joint Exhibit 10-J.) (Stip. Par. 13, R. 26.) (R. 123.)

On November 19, 1943, decedent filed with the Court an Amendment to Petition for Order Allowing Additional Payment from Corpus of Trust in which the prayer of her petition filed on October 25, 1943, was amended to read as follows:

WHEREFORE, petitioner prays for an order of Court authorizing and directing the First National Trust & Savings Bank of San Diego, as Trustee, to pay to petitioner or her order as Trustor under said Trust Indenture, or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance, the sum of Four Hundred and Forty-five ($445.00) Dollars per month, paying the same out of the net income available for said purpose, but if said income is insufficient to pay said sum, then out of the balance of the corpus of said trust estate. (Joint Exhibit 11-K.) (Stip. Par. 14, R. 26.) (R. 123, 124.)

On the same day, November 19, 1943, there being no one appearing in opposition to the petition, the Court entered its order authorizing and directing the trustee to make payments as prayed for in the petition of October 25, 1943, as amended on November 19, 1943. (Joint Exhibit 12-L.) (Stip. Par. 15, R. 26.) (R. 124.)

Pursuant to the Court orders of June 11, 1943, and November 19, 1943, the trustee paid to decedent out of corpus of the trust the following amounts:

Year		Amount
1943	(subsequent to June 11)	$ 624.06
1944		1,175.17
1945	(prior to decedent's death on March 3)	130.25
	Total payments out of corpus	$1,929.48

(Joint Exhibit 13-M.) (Stip. Par. 15, R. 26.) (R. 124.)

All of the Court proceedings detailed above were uncontested. Except for the original petition to alter, or amend the trust, in which decedent was joined by her two children, decedent alone, through her attorney, filed all subsequent petitions, although the names of the children appear in the captions. (Joint Exhibits 3-C, 4-D, 5-E, 6-F, 1 and 2, 7-G, 8-H, 9-I, 10-J, 11-K, 12-L.) Neither of the children ever requested an increase in their monthly payments of $75 each from the trust; nor did they ever petition the Court for payments out of corpus. (R. 48.) No corpus was ever used for the benefit of either of the two children. (R. 124, 125.)

Subsequent to the death of decedent, there was paid out of the corpus of the trust estate the following items:

4/10/45—	Bradley-Woolman Mortuary funeral expenses	$ 574.94
8/22/45—	W. S. Heller, County Treasurer California State Inheritance Tax in matter of Estate of Dell Hinds Higgins, deceased, per order of fixing Inheritance Tax dated 8-1-45	$3,262.44

(Joint Exhibit 13-M.) (Stip. Par. 16, R. 27.) (R. 125.)

In the Federal estate tax return the funeral expenses in the amount of $574.94 were included in the total deductions claimed of $2,477.38. (Joint Exhibit 1-A.) (R. 125.)

The property comprising the trust estate on the date of decedent's death consisted of bonds, preferred and common stocks, and $1,539.81 in cash, making an aggregate total of $188,302.40. (Joint Exhibit 14-N.) (Stip. Par. 17, R. 27.) (R. 125.)

At the time of her death decedent owned only her car, her jewelry, and cash in the amount of $1,980.27. Decedent's last will, dated April 8, 1940, reads as follows:

> I give to my daughter HELEN B. KENDALL all my clothes, ornaments, everything in my home, except the jewelry I have already willed to others,—for her to take and keep as her own. All my things in Helen's home are to be hers also.

(Joint Exhibit 1-A.) (Stip. Par. 18, R. 27, 28.) (R. 125, 126.)

SUMMARY OF EVIDENCE

Dell Hinds Higgins, also known as Dell M. Harrow, also known as Dell M. Higgins, decedent, trustor, was born May 31, 1869, created irrevocable trust indenture March 24, 1928, died March 3, 1945. Married Albert Edward Higgins in 1887, they had two children, a son, Sydney M. Higgins, born March 2, 1889, and a daughter, Helen B. Higgins, born July 17, 1894. Helen was married on April 10, 1917, to Kenneth Kendall. Decedent's first husband died in 1913, left property to which Sydney and Helen were entitled to a part, although they did not at the time claim it, it went to decedent. Both children are still living. The trust indenture made provision for $75 per month for each of the children out of the income of the said trust. On April 9, 1925, decedent married Samuel Harrow.

The impelling cause of the trust indenture of March 24, 1928, was motivated by purposes associated with life, namely, to place trustor's property in a position so that her then husband, Samuel Harrow, could not get any part of it. Immediately after the property was placed in trust, decedent made settlement with him for the sum of $5,000. Subsequently, on July 5, 1928, he obtained an interlocutory judgment by default in an action for divorce against decedent.

At the time the trust was created trustor was not in bad health, made no mention of anticipating, ex-

pecting, or being near death, and lived for seventeen years thereafter. Her only serious illness prior to her death was in 1903 at which time she had pneumonia. She was alert and a good business woman, she resented signing the trust as in so doing she lost complete control of her property. Trustor was advised by her attorney and the trustee Bank that the property conveyed or transferred to the trust would not be subject to Federal estate tax.

SPECIFICATION OF ERRORS RELIED UPON

(1) The Findings of Fact of The Tax Court are not supported by the evidence;

(2) The failure to hold the transfer of the corpus of the trust of March 24, 1928, was an inter vivos transfer, and not made in contemplation of death;

(3) The failure to hold that the transfer was inter vivos and was intended to take effect in possession or enjoyment at the time it was made, namely, March 24, 1928, within the meaning of Internal Revenue Code, section 811(c);

(4) The failure to hold that the decedent did not reserve the power to limit, amend, transfer, or revoke the trust within the meaning of the Internal Revenue Code, section 811(d);

(5) The failure to determine that the transfer of the gift was made prior to March 3, 1931, and the value of the property of the trust was for that reason not subject to estate tax;

(6) The failure to hold that said gift was made for a purpose connected with life: namely, to divest herself of the property so that her then husband could not get it and for that reason not subject to estate tax;

(7) The failure to find that the gift could not have been made in contemplation of death as the trustor was in normal health at the time the trust was created, March 24, 1928, and lived seventeen years thereafter;

(8) The failure to find that the property of the trust was not subject to estate tax pursuant to section 811(c) and/or section 811(d) of the Internal Revenue Code as both sections became effective subsequent to the effective date of the trust, March 24, 1928, were not retroactive and for that reason the decision was contrary to the Fifth and to the Fourteenth Amendments to the Constitution of the United States of America;

(9) The failure to find the Trustor did not retain a string on the corpus of the trust property;

(10) The failure to hold that there was no possibility of the trust property reverting to the trustor;

(11) The failure to determine the trustor only reserved a part of the income of the trust property to herself as a definite amount of the income was at the time the trust was created given to her daughter Helen and her son Sydney;

(12) The failure to find the trust indenture was irrevocable and the trust property passed completely out of the control of the trustor;

(13) The failure to hold the trustor's estate possessed no right or interest in the trust property at the time of the trustor's death as the transfer of the trust property passed on March 24, 1928, at the time the trust was created.

SUMMARY OF ARGUMENT

The Findings of Fact and Opinion of The Tax Court are not supported by the evidence in this cause, as it was determined on the basis of *Commissioner v. Estate of Church,* 335 U. S. 651, 69 S. Ct. 337, *Estate of West v. Commissioner,* 9 T. C. 736, *Estate of Durant v. Commissioner,* 41 B. T. A. 462, and *Estate of Spiegel v. Commissioner,* 335 U. S. 701, 69 S. Ct. 301, and the facts in the instant cause are distinguishable from the *Church, West, Durant,* and *Spiegel* cases. In the instant cause the decedent was not a trustee, she did not retain the entire income to herself, a part of it was first set aside to her daughter and her son, therefore, possession and enjoyment passed as an inter vivos transfer at the time of the conveyance of the property, March 24, 1928, the corpus of the trust could not be invaded by any of the beneficiaries of the trust, under no circumstances did she retain to herself a reversionary interest. Upon her death and upon the death of both of her children, Sydney and Helen, the corpus is to be distributed one half to the issue of Sydney and one half to the issue of Helen by right of representation. Failing issue of either, the entire corpus is to go

to the issue of the other. Failing issue of both, the corpus is to go to the heirs at law of Sydney and Helen. It is the contention of the petitioner that neither that part of the trust estate from which the decedent retained the income to herself nor that part of it which was set aside to her son and daughter is subject to Federal estate tax.

In the decision of The Tax Court, section 811, subsections (c) and (d) of the Internal Revenue Code was given consideration, which is in direct contravention to the Fifth and to the Fourteenth Amendments to the Constitution of the United States of America, as the transfer was made prior to March 3, 1931, the date of the Joint Resolution of Congress which changed the law under the Revenue Act of 1926, section 302(c), under which section the evidence shows the transfer was made for purposes connected with life, Dell Hinds Higgins, the trustor, had no power to invade the corpus of the trust property, the trust was irrevocable, under the law applicable at the time of the creation of the trust it was not subject to Federal estate tax.

Although The Tax Court did not decide the question involved as to whether or not the transfer was made in contemplation of death, the evidence very definitely shows that the trust was motivated by purposes associated with life, namely, to place trustor's property in a position so that her then husband, Samuel Harrow, could not obtain any part of it, that the trustor was not in bad health, that she was alert and a good busi-

ness woman at the time the trust was created, March 24, 1928, and lived for seventeen years thereafter, all of which overwhelmingly supports the contention of the petitioner that the trust was not made in contemplation of death.

ARGUMENT

The Record Completely Fails to Support the Determination of the Tax Court, as the Four Cases, Church, West, Durant, and Spiegel, Which Constitute the Basis of Its Decision are Distinguishable From the Instant Case.

In the Opinion of The Tax Court it cites four cases, namely, *Commissioner v. Estate of Francois L. Church,* 335 U. S. 651, 69 S. Ct. 337; *Estate of Virginia H. West v. Commissioner,* 9 T. C. 736; *Estate of Norma P. Durant v. Commissioner,* 41 B. T. A. 462; and *Estate of Spiegel v. Commissioner,* 335 U. S. 701, 69 S. Ct. 301.

Each of the above cases are clearly distinguishable from the cause now before the Court. Counsel will take each of the cases in order and distinguish it from the cause now before this Court.

In the first case, *Church* executed a trust in the state of New York during the year 1924. He was then 21 years of age, unmarried and childless. He and two of his brothers were named co-trustees. Certain corporate stock was transferred to the trust with grant of power to the trustees to hold and sell stock and rein-

vest the proceeds. *Church* reserved no power to alter, amend, or revoke the trust but required the trustees to pay him the income for life. He died in 1939. The trust terminated. It contained some directions for distribution of the assets when he died. These directions as to final distribution did not provide for all possible contingencies. If *Church* died without children and without any of his brothers or sisters or their children surviving him, the trust instrument made no provision for the disposal of the trust assets. The Commissioner's contention was that, under New York law, had there been no surviving trust beneficiaries, the corpus would have reverted to decedent's estate.

In the instant cause (*Higgins*), the trust was executed March 24, 1928, the trustor selected a corporate trustee with the right to appoint a new and different trustee, with the restriction that the new trustee must be a corporate trust company authorized to do a trust business in the State of California under the laws of the State of California or under the laws of the United States. The trustor reserved no power to alter, amend, or revoke said trust and the trustee was required during the lifetime of the trustor to pay out of the net income of the trust estate $75 per month to her daughter, Helen B. Kendall, or, if she should die, to her issue by right of representation, and $75 per month to her son, Sydney M. Higgins, or, if he should die, to his issue by right of representation, and the entire balance of the net income of the trust estate to the trustor. After the death of the trustor, the entire income of

the trust estate in equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of the said beneficiaries, to the issue of the deceased beneficiary by right of representation. The trust instrument contained the provision that it should terminate upon the death of the survivor of the trustor, her daughter, Helen B. Kendall, and her son, Sydney M. Higgins. Upon the termination of the trust, the entire corpus of the trust estate shall go to and be distributed among the issue of Helen B. Kendall and Sydney M. Higgins by right of representation. In the event there is no living issue of either one or the other of Helen B. Kendall and Sydney M. Higgins at the time of the termination of the trust, then the entire corpus of the trust shall go to the issue of the other, and if there is no issue of either Helen B. Kendall or Sydney M. Higgins living at the time of the termination of the trust, then the entire corpus of the trust estate shall go one-half to each of the respective heirs at law of Helen B. Kendall and Sydney M. Higgins. (Joint Exhibit 2-B, R. 13-21.) (Stip. Par. 4, R. 24.)

In the *Church* case, *Church* was one of the co- trustees. In the *Higgins* case there was a corporate trustee. The trustor in neither case reserved the power to alter, amend, or revoke the trust. In the *Church* case, the trustor required the income to be paid to him for life. In the *Higgins* case, after payment of $75 a month to each of her two children, the trustor received the residue of the income, therefore the trustor parted with possession and enjoyment of the property at the date

the trust was created. In the *Church* case, under the New York law, there was no final disposition of the trust assets. In the *Higgins* case, the final disposition of the assets was one-half to each of the respective heirs at law of Helen B. Kendall and Sydney M. Higgins, the daughter and son respectively of the trustor. (Joint Exhibit 2-8, R. 13-21.) (Stip. Par. 4, R. 24.)

In the *West case, supra,* p. 736, at 739, The Tax Court stated in its Opinion:

> "Here the trust provided external standards. The trustees were authorized to encroach upon the corpus for the decedent's 'proper maintenance and support' and for 'any emergency which may arise affecting her, occasioned by sickness, accident, ill health, affliction, misfortune, or otherwise.' These standards imposed a limit upon the Trustees' discretion to act 'as they may consider reasonable and necessary.' We think the trust provided an enforceable right to have the corpus thereof invaded for the decedent's benefit."

Date trust created: November 9, 1926. Trustor died December 16, 1941.

In the instant case, neither trustor nor trustee had the right to invade the corpus of the trust for the benefit of the trustor or any of the beneficiaries. Article 7 of the Higgins trust, formerly the Harrow trust, provides as follows:

> "7. If it should happen during the continuance of this trust that the net income of the Trust

Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts."

Under such provisions no clear external standard was set, nor was the trustor the only person who could apply for relief under the said Article 7. Any one of the beneficiaries might apply, however, the relief sought was limited and left to the sound discretion of a court of competent jurisdiction and was not an enforceable right. It should be observed that in *Estate of West, supra,* trustor was a co-trustee, whereas in the instant case there was a corporate trustee and said trustee had no power or discretion to grant relief. Only a court of competent jurisdiction had the untrammeled power to grant the relief to the extent necessary to relieve the situation as provided for in Article 7 of said trust indenture. (Joint Exhibit 2-B, R. 13-21.) (Stip. Par. 4, R. 24.)

Regarding the *Durant* case, *supra,* the trust was created March 30, 1926, trustor died August 24, 1935. The trust instrument in the *Durant* case provided that

she was to receive $1,250 monthly out of the income and if the income was insufficient to pay said amount, out of the corpus of the property turned over to the trustee, for and during her natural life or until the property turned over to the trustee and the income therefrom had been paid over to the said Norma P. Durant. It further provided that if $1,250 was insufficient in the judgment of said trustee to properly provide for the comfort, maintenance, and enjoyment of life by said Norma P. Durant, the said sum to be paid monthly to her be increased to such sum as in the opinion and judgment of said trustee is proper. And in addition to the monthly provision for maintenance etc., any further sum or sums of money for the purpose of traveling, or purchasing a home or other real estate solely, however, for her own use and enjoyment, and the trustee may further pay to the said Norma P. Durant money for other purposes which in the opinion and judgment of said trustee it may be advisable to pay her in view of all existing conditions and circumstances. The agreement provided that, upon the death of the trustor, the trustee should ascertain and pay all of the just debts of the said Norma P. Durant. It also provided for the disposition of the residue in a comparable manner, and in a large measure in identical language, with decedent's Will executed December 22, 1925. The facts also show that the value of the trust corpus on March 30, 1926, the date of its creation, was $55,950. There was added thereto on October 24, 1928, securities and other property to the value of $78,730.88.

From the date of the creation of the trust, March 30, 1926, to the date of decedent's death, August 24, 1935, there was paid to the decedent $61,365.69 from the income received from the trust, and $70,516.50 from the principal of the trust, making a total payment of $131,882.19. The Tax Court in its Opinion stated, at the bottom of page 464:

> "Powers residing in the decedent either alone or at least in conjunction with the trustee were such that the amendment, revocation, or alteration of the trust was in reality retained by decedent until the time of her death. The stipulated monthly payments were obviously materially in excess of any anticipated income from the property. It resulted, and must have been contemplated, that periodic invasions of principal would be necessary. Only decedent's refusal to accept such fragmentary distributions of principal could prevent the estate from being dissipated in its entirety. In fact, in the period of less than ten years of the trust's operation approximately 50 percent of the principal was so disbursed. At the same rate it would not have lasted for ten years more. Again, the primary obligation of the trustee upon decedent's death was to pay all of her debts, so that by the simple expedient of obtaining by loans or advances such amounts of principal as she might see fit she could effectively prevent all or any part of the property from passing to the remaindermen."

There is no similarity between the facts in the *Durant* case and those in the *Higgins* case. In the *Durant* case, the trustee had wide and untrammeled discretion, whereas in the *Higgins* case the trustee had no discretion but the sound discretion rested in a court of competent jurisdiction and was then very limited as to any benefit which might be obtained by any of the beneficiaries under the trust, as provided in Article 7 of said instrument. (Joint Exhibit 2-B, R. 13-21.) (Stip. Par. 4, R. 24.)

Summary of the *Durant* trust: It appears that the trust was created merely for the purpose of selecting someone to act in an advisory capacity, make investments, and keep books of account for the trustor. And, further the trust indenture for all intents and purposes corresponded with her last Will and Testament made December 22, 1925.

It is difficult to understand why the Court cited the *Spiegel* case, as this involved a trust created in the year 1920 which included the, settlor's gross estate wherein there was a possibility of a revertor to the settlor by operation of the law. In the instant case, The Tax Court stated in its Opinion:

> ". . . And whatever doubt there may have been that such an invasion affecting only a part of the estate might be too insignificant to justify taxing all of it must now yield to the principle enunciated in *Estate of Spiegel v. Commissioner*, 335 U. S. 701, January 17, 1949."

In the *Higgins* case there was no possible reversion to the trustor, whereas it was held in the *Spiegel* case there was a reversion to the grantor. Provision is made, as set out in the trust indenture (Joint Exhibit 2-B, Article 6, R. 17), that if neither the daughter nor son of the trustor should leave issue, then the trust property in the final analysis would go one-half to the heirs at law of Helen B. Kendall and one-half to the heirs at law of Sydney M. Higgins, which clearly shows that there was no intent of the trustor to reserve for herself a contingent reversionary interest in the trust. Our contention is that the trustor, so far as title to the corpus of the trust is concerned, made a *bona fide* transfer of the property in which the trustor absolutely, unequivocably, irrevocably, and without possible reversion parted with all of her title and all of her physical possession or enjoyment of the property transferred on March 24, 1928. That after the transfer had been made, the trustor was left with no legal title in the property, no possible reversionary interest in the property, and no right to possess or enjoy the property then or thereafter. After the execution of the trust, the trustor held no right in the trust estate which in any sense was the subject of testamentary disposition. The said trust indenture was in no way associated to a will. The transfer of the title to the property was unaffected subsequent to March 24, 1928, whether the grantor lived or died.

The Tax Court in the *Higgins* case said: "Our conclusion that the trust is taxable as part of decedent's

estate for the reasons given eliminates the necessity of considering the alternative contention of a transfer in contemplation of death." It is evident that the trust was not created, nor the property transferred to the trust, in contemplation of death, but on the contrary was actuated by motives associated with life, as the objects and purposes of the trust were to place the trustor's property beyond any possible control of her then husband, Samuel Harrow, who plagued and harassed her for money and caused her to become highly nervous (R. 32, 47, 88) and would take her past cemeteries and hospitals and tell her that was where he was going to put her. He constantly made demands upon her for money and she was in constant fear that he would cause her death in order to get her money. (R. 33, 49, 50, 55.) (R. 115.) Although a good business woman, enjoyed handling her own business matters and property, she consented to place her property in trust so that her then husband, Samuel Harrow, could not obtain it. (R. 75, 88, 116, 117.) She was approximately 59 years of age at the time she created the trust, 17 years later she died at the age of approximately 76 years. (R. 12, 23.)

At the date the trust was created, there was no law requiring a Federal gift tax. In fact, there was no Federal gift tax act for the period January 1, 1926, to June 2, 1932.

On April 14, 1930, in the case of *May v. Heiner,* 281 U. S. 238, 74 L. Ed. 826, the Supreme Court in its

Opinion laid down the rule that where the donor reserved the income for life, transfer was not made in contemplation of death within the legal significance of those words and not testamentary in character and was beyond the recall of the trustor, that at the date of the death of the trustor no interest passed from the decedent to the living; title thereto had been definitely fixed by the trust deed, the property was not to be included in the donor's estate for Federal estate tax purposes. (In the cause before the Court, the trust was not made in contemplation of death, the property was beyond the recall of the trustor, and title to the property passed on the date of the trust instrument, namely, March 24, 1928.) The law was immediately changed after this decision by a Joint Resolution of Congress, March 3, 1931, amending section 302(c) of the 1926 Revenue Act, now section 811(c) of the Internal Revenue Code, to include, among others, transfers "under which the transferor has retained for his life . . . (1) the possession or enjoyment of, or the income from, the property" transferred. This change in the law was held not to have retroactive effect in *Hassett v. Welch* (1938), 303 U. S. 303, 58 S. Ct. 559, and many other cases, and to be applicable only to transfers made on or after March 3, 1931.

Petitioner contends that section 811(c) is not applicable and quotes from *Hassett v. Welch, supra:*

> "The history of the Resolution is of material aid in its construction. Section 302(c) of the Act of

1926, like earlier acts, measured the tax by the inclusion in the gross estate of property of which the decedent had made a voluntary transfer in contemplation of, or intended to take effect in possession or enjoyment at or after his death. Notwithstanding the Treasury had ruled that a transfer of assets with a reservation of income for the donor's life came within the definition, this court held otherwise. (May v. Heiner, 281 U. S. 238, 50 St. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244, construing section 402(c) of the Revenue Act of 1918, 40 Stat. 1057, 1097.) Dissatisfied with the decision, the Government sought a reversal of it but, in three judgments, announced on March 2, 1931, the ruling was reaffirmed. (Burnet v. Northern Trust Co., 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412; Morsman v. Burnet, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412; McCormick v. Burnet, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, construing section 402 (c) of the Revenue Act of 1921, 42 Stat. 278, and section 302(c) of the Revenue Act of 1924, 43 Stat. 304, 26 U. S. C. A. 411 note.) In the opinions in these cases, which led to the preparation and adoption of the Resolution, the court said there was 'no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved.' There then remained one day of the current session of Congress. The Treasury drafted an amendment of section 302(c) to bring

trusts of this type within its sweep, in the form of the Joint Resolution of March 3, 1931, which was sent to Congress on the day of our decisions and was passed, under a suspension of the rules, on the next day, the last of the session. (Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, p. 7198.)

"Because its passage was considered exigent, the Resolution was adopted without having been printed and in reliance on statements made from the floor. The Congressional Record discloses the understanding of the Congress with respect to its scope. Mr. Garner, of the House Ways and Means Committee, stated: 'The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it.' (Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, pp. 7198-7199.)

"Mr. Hawley of the same committee, in charge of the Resolution, stated, in answer to a question, 'It provides that hereafter no such method shall be used to evade the tax' and, referring to the situation created by the decisions of this court, he said: 'It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under

which they will be enabled to escape the estate tax upon their property. It is of the greatest importance, therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed.'

"This language, we think, scarcely bears the interpretation put upon it by Government counsel—that the tax was meant to be laid on estates of all who died after the adoption of the Resolution.

"Bearing in mind that the Resolution was prepared and its passage recommended by the Treasury, the administrative interpretation supports in uncommon measure the view that it was not intended to operate upon transfers completed prior to its passage. Promptly upon its passage the Department issued T. D. 4314, (C. B. X-1, 450), approved by the Secretary of the Treasury May 22, 1931, which was in the form of a letter to collectors of internal revenue and others concerned. It quoted the language of the Resolution, and stated:

"'In view of the decisions of the Supreme Court of the United States in Nichols v. Coolidge, 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081 (T. D. 4072, C. B. VI-2, 351), May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244 (Ct. D. 186, C. B. IX-1, 382), Coolidge v. Long, 282 U. S. 582, 51 S. Ct. 306, 75

L. Ed. 562; Burnet v. Northern Trust Co., 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412; Edgar M. Morsman, Jr. v. Burnet, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412; and Cyrus H. McCormick v. Burnet, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will notwithstanding the provisions of section 302(h) of that Act, be applied *prospectively* only, i.e., to such transfers coming within the amendment as were made *after* 10:30 p.m., Washington, D.C., time, March 3, 1931.

"'Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.' (Italics in the original.)"

That, further, the Joint Resolution of March 3, 1931, amendments thereto, and acts subsequently passed, have no retroactive application to the trust indenture of March 24, 1928.

Under the circumstances, petitioner contends that to include the trust property of $188,302.40 as a part of the estate of the decedent and to determine a deficiency thereon in the sum of $29,009.69 would violate the Fifth and the Fourteenth Amendments to the Constitution of the United States of America.

Without admitting in any way that the *Church* and *Spiegel* cases, *supra,* are applicable hereto, but for the

sake of arugment only, we respectfully call to the Court's attention that on June 7, 1949, H. R. 5045 was introduced in the House of Representatives to amend section 811(c) of the Code with respect to the *Church* situation. This bill provides:

> "That section 811(c) of the Internal Revenue Code is amended by striking out the semicolon at the end thereof and inserting a period, and by adding the following, effective as to estates of all decedents whether death occurred before or after passage of this Act: 'Property transferred before 10:30 postmeridian, eastern standard time, March 3, 1931, shall not be included in the gross estate under this section by reason of the fact that the decedent retained an estate for life in such property.' "

And as for the *Spiegel* case, there was no possible reversionary interest in the property to the decedent Dell Hinds Higgins, so that the *Spiegel* case is not at all applicable to the instant cause.

"Lawyer's Weekly Report", published weekly by Prentice-Hall, Inc., August 15, 1949, Volume 4 - No. 47, on the last page, makes the following statement:

> "Legislation to Cover Church and Spiegel: The Senate Finance Committee has recommended that H. R. 5268 be passed with two important additions. The original proposals were described in our July 25th issue (p. 2, 'Tax Relief'). The proposed additions:

1. Reinstate the status quo before the Church decision (335 U. S. 632). In other words, as to trusts created before March 4, 1931, the trust property would *not* be included in the creator's taxable estate merely because he had reserved a life estate in the property. The amendment would be made retroactive to Feb. 10, 1939 (when the Internal Revenue Code was enacted).

"2. Include only the actuarial value of the decedent's interest in property transferred during life where he retained a reversionary interest. This additional amendment is designed to relieve hardship in cases like *Spiegel* (355 U. S. 701). There, the decedent had a remote possibility of reverter in a million dollar trust fund. Actuarially his interest was worth only $70, but the full value of the trust property was included in his estate for tax. This amendment would be effective only as to estates of person's dying after its adoption."

The Congress, public press, American Bar Association—Section of Taxation, tax services, estate and tax magazines, have all commented upon the harshness or hardship which will result from the rules laid down in the *Church* and *Spiegel* cases, and even the Commissioner of Internal Revenue has proposed to issue new regulations which would give relief under these two cases.

It is the contention of the petitioner that the trust created March 24, 1928, was not made in CONTEM-

PLATION OF DEATH but was actuated by motives associated with life; that the transfer of the property to the trust was intended to and did take effect in possession or enjoyment at the time the said trust was created; that the death of the trustor did not alter any of the interest created by the said trust; that title had been definitely fixed by the said trust indenture; that the trustor retained no strings upon the property placed in said trust; that the trustor did not retain the exercise of a power either alone or in conjunction with any one person to change the beneficiaries, to alter, amend, revoke, or terminate the said trusts; that the trustee was under no enforceable fiduciary obligation in the exercise of its discretion to pay the principal of the trust or any part thereof to the grantor; that the said trust instrument was not testamentary in character and was beyond recall by the trustor; that there was no external standard established whereby either the trustor or trustee could invade the corpus of the trusts; that any invasion of the trust rested in the absolute and uncontrolled discretion of a court of competent jurisdiction and was not an enforceable right; that at the time the trust was created, March 24, 1928, section 302(c) of the Internal Revenue Act of 1926 was the law applicable and imposed no tax upon the said trust; that the Joint Resolution of March 3, 1931, amendments to, and acts subsequently passed, have no retroactive application and trustor retained no strings by which she could regain possession or control of the trust property nor did her death alter any of the in-

terest created by the trust; that the Commissioner erroneously determined a deficiency of estate tax liability in the sum of $29,009.69 by invoking section 811(c) and 811(d) of the Internal Revenue Code and to invoke the said provisions is in contravention to the Fifth and the Fourteenth Amendments to the Constitution of the United States of America.

Further, the petitioner contends The Tax Court erred in sustaining the objections made by counsel for the respondent when petitioner's counsel requested the admission into evidence of petitioner's Exhibits No. 16, Complaint for Divorce, Samuel Harrow, Plaintiff, v. Dell M. Harrow, Defendant, (R. 90, 91-94, 97, 99, 107, 110, 112) and No. 17, Commission to Take Deposition of Mary Mountain, Certificate, and Deposition of Mary Mountain (R. 95-97, 99, 107, 110, 111), objections noted (R. 94-96), as these Exhibits show clearly that the impelling cause for making the trust indenture of March 24, 1928, was to place trustor's property beyond the grasp of her then husband, Samuel Harrow; that the transfer was motivated by purposes associated with life, and connot be deemed to have been made in contemplation of death. (See comments under Synopsis of Exhibits, Petitioner's Exhibits Nos. 16 and 17, this brief.) *United States v. Wells,* 283 U. S. 102, 51 S. Ct. 446, 9 A.F.T.R. 1440 @ 1445; *Becker v. St. Louis Trust Co.,* 296 U. S. 48, 56 S. Ct. 78, 16 A.F.T.R. 989 @ 991; *Colorado National Bank v. Commissioner,* 305 U. S. 23, 59 S. Ct. 48, 21 A.F.T.R. 965 @ 966.

At the time the trust was executed and became effective on March 24, 1928, the law applicable to the said trust was under section 302(c) of the Revenue Act of 1926. During the period from January 1, 1926, to June 2, 1932, there was no Federal gift tax in effect. The Joint Resolution of the Congress of March 3, 1931, the amendment to section 302(c) of the Revenue Act of 1932, and subsequent amendments thereto are prospective in their operation and for that reason do not impose a tax in respect to past irrevocable transfers with reservation of a life interest.

Under the circumstances, this case definitely does not come within the rules laid down in the four cases, namely, *Commissioner v. Church, supra, Estate of West v. Commissioner, supra, Estate of Norma P. Durant v. Commissioner, supra,* and *Estate of Spiegel v. Commissioner, supra,* which were the basis of the decision of The Tax Court. In giving consideration to the facts and the law as brought out in this cause, it should be determined that the trust estate in the sum of $188,-302.40 is not subject to Federal estate tax and should not be included in the gross estate of the decedent, Dell Hinds Higgins, nor a deficiency determined of estate tax liability in the sum of $29,009.69, or any other amount.

CONCLUSION

On the basis of the law and the facts, it is respectfully submitted that the findings and decision of The Tax Court of the United States should be reversed wherein it found a deficiency in estate tax of $29,009.69, and judgment entered for the petitioner covering the estate tax claimed of $29,009.69, and interest thereon in the sum of $4,849.45, which has been paid to the Collector of Internal Revenue of the Sixth District of California in the total sum of $33,859.14, in lieu of bond or undertaking and to stop interest from accruing in connection with the deficiency claimed, together with interest thereon from and after the date of the payment thereof, to-wit; March 16, 1949.

Respectfully submitted,

GEORGE H. STONE
WM. D. MORRISON
Counsel for Petitioner

September 15, 1949.